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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted]7

SUSAN EPPERSON and H. H. BLANCHARD,
Appellants,

v.

STATE OF ARKANSAS,
Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN JEWISH CONGRESS, AS *AMICI CURIAE*

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v.

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Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN JEWISH CONGRESS, AS *AMICI CURIAE*

Statement of the Case

This brief is submitted by consent of the parties.

This is a suit by a public high school science teacher and a parent of children attending public schools in Arkansas for judgment declaring the unconstitutionality of a state statute (Ark. Stats. Ann. Secs. 80-1627 and 80-1628) making it a penal offense to teach in any tax-supported school "the theory or doctrine that mankind ascended or descended from a lower order of animals" or to use a textbook containing such teaching. The lower

court (Chancery Court of Pulaski County) upheld the appellants' contentions and issued a decision declaring the statute unconstitutional, but the Supreme Court of Arkansas reversed and held the statute to be "a valid exercise of the state's power to specify the curriculum in its public schools." Thereafter this Court noted probable jurisdiction of the appellants' appeal.

Interest of the *Amici*

The American Civil Liberties Union is a private, nonpartisan organization, engaged solely in defense of the Bill of Rights. It joins in this brief *amicus curiae* because it believes that the Arkansas prohibition against the teaching of evolution in the public schools is essentially an abridgment of the First Amendment and of academic freedom. The Union, having been intimately associated with *Scopes* v. *Tennessee* 40 years ago, when this issue first arose in the courts, looks forward to its final resolution in this case.

The American Jewish Congress is a national organization of American Jews founded in 1918 and committed by its constitution to the dual and inseparable purposes of defending and extending American democracy and preserving our Jewish heritage and its values. We join in this brief because we believe the statute in question infringes upon the guarantees of free speech, religious liberty and separation of church and state, secured by the First Amendment.

Statutory Provision Involved

Ark. Stats. Ann. Secs. 80-1627 and 80-1628 provide as follows:

> SECTION 80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.
>
> SECTION 80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOKS MENTIONING DOCTRINE.—PENALTIES.—POSITIONS TO BE VACATED.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (80-1627) hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member.

Question to Which this Brief is Addressed

Does the Arkansas statute violate the Fourteenth Amendment of the Federal Constitution either through the direct operation of the Due Process Clause or through the Amendment's rendering applicable to the states the First Amendment's prohibition of laws respecting an establishment of religion or abridging freedom of speech?

Summary of Argument

I. The Supreme Court of Arkansas was in error in assuming an unlimited power in the state to specify the content of subjects which are part of the public school curriculum. Like all other powers, this too must be exercised within the limits of the constitutional requirement of due process of law. That provision of the Constitution bars arbitrary action by government even in the exercise of its proprietory functions. A law making it a penal offense for a teacher to perform his duties in accordance with accepted professional standards violates the Due Process Clause, at least in the absence of any countervailing state interest.

II. A court's power judicially to note historical facts enables this Court to find that the purpose of the Arkansas statute was to forbid teaching deemed to be inconsistent with a literal interpretation of the Biblical account of the creation of man. This certainly is the primary if not sole effect of the law. As such it is a law respecting an establishment of religion in violation of the First Amendment.

III. Freedom to teach and freedom to learn are both protected by the free speech guaranty of the First Amendment. These freedoms may not be restricted in the absence of convincing evidence that restriction is necessary to prevent a clear, imminent and serious injury to the community. Such evidence is patently lacking in the present case.

ARGUMENT

POINT I

The Arkansas statute is an arbitrary exercise of state power in violation of the Due Process Clause of the Fourteenth Amendment.

The cryptic opinion of the Arkansas Supreme Court states only that a statute making it a crime for a public school teacher to teach "the theory or doctrine" of evolution is a "valid exercise of the state's power to specify the curriculum in the public schools." While this can perhaps be interpreted to mean that other exercises of the power to specify curriculum may be invalid, the present one is valid. But no reason is given by the court for distinguishing the present exercise of the power from others, and the most reasonable interpretation of the decision is that the statute is valid because the state has the power to specify the curriculum in its own schools, at least in the absence of a specific constitutional prohibition, such as that against teaching religious dogma or prayers. *McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Engel* v. *Vitale,* 370 U. S. 421 (1962).

We seek to establish in our second point that the Establishment Clause of the First Amendment does indeed forbid a prohibition of the teaching of the theory of evolution as it forbids the teaching of religious dogma or prayers. It is true that, as this Court pointed out in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943), "it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake," and that the "test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved." Nevertheless, the Due Process Clause does have a vitality of its own and does serve a substantive function broader than that of transmitting the First Amendment to the states. While this does not empower the Court to "sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions" (*Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965)), it does, we submit, forbid arbitrary governmental interference with academic integrity. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Farrington* v. *Tokushige,* 273 U. S. 284 (1927). Academic freedom and professional integrity are higher values in our democracy than economic *laissez-faire,* and as to these, as in the case of marital privacy, the Due Process Clause of the Fourteenth Amendment serves a function in relation to the states analogous to the Ninth Amendment in relation to the Federal government.

The Arkansas Supreme Court framed the issue in this case in the terms of the power of a state to specify the curriculum in its public schools. It resolved the issue by holding in effect that this power is constitutionally unlimited. This is by no means so. In *West Virginia State Board of Education* v. *Barnette, supra,* this Court held that a state could not constitutionally prescribe a curriculum which included compulsory flag-saluting. In *McCollum* v. *Board of Education, supra,* a similar ruling was made in respect to religious instruction and, in *Engel* v. *Vitale, supra,* and *Abington School Board* v. *Schempp,* 374 U. S. 203 (1963), in respect to prayer recitation and Bible reading.

In *Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954), the Court held racial segregation in the public schools to be unconstitutional because it "generates a feeling of inferiority" in the Negro children. Suppose a state integrated its public schools but prescribed a course in the racial inferiority of Negro children. Can it be doubted that this prescription by the state of its own curriculum would be held invalid under the Fourteenth Amendment?

Actually what is in issue here is not the power of the state to prescribe the curriculum in its public schools. The question in this case is not whether the State of Arkansas can prescribe a public school curriculum which does not include a course in biology or even in science. The question is whether the state may in all circumstances prescribe a content for a course which violates universal educational standards for the teaching of the course.

Indeed, the question is even narrower than that. Ordinarily, the content and method of teaching a course is left by the state in the hands of the professional educators, where it properly belongs. (This, Arkansas, like all other states, seems to have done with respect to every course and course-content except evolution.) If a teacher does not follow prescribed curriculum or course content he may be called to account by his educational superior, and if he persists may be discharged. The Arkansas statute provides criminal sanctions for the offense. This smacks more of punishment for heresy than regulation of curriculum.

It is no answer to say that, since the state owns the public schools, it can run them in any way it wants. Even a private owner of property may be subject to constitutional limitations in the manner in which he operates it. *Marsh* v. *Alabama*, 326 U. S. 501 (1946). But even if that were not so, and if in all cases a nongovernmental owner of property is subject to no constitutional restraints in what he does with his property, the time is long past when it could be validly argued that government acting in its proprietary capacity enjoys the same freedom to act arbitrarily as does a private owner. We are long past the day when the Court could say, as it did in *Davis* v. *Massachusetts*, 167 U. S. 43, 47 (1897): "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." See *Hague* v. *C.I.O.*, 307 U. S. 496 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

A private person may bar an obnoxious preacher from his parlor, but a state cannot constitutionally bar him from its parks. *Kunz* v. *New York,* 340 U. S. 290 (1951). A private employer may refuse to hire an atheist or a member of the Communist party, but a state may not. *Torcaso* v. *Watkins,* 367 U. S. 488 (1961); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967).

More closely related to the present case, a state may require military training as a compulsory course in a state university not because the state has judicially unreviewable discretion in specifying the curriculum in its public schools but because, by reason of its vital interest in national defense, the discretion cannot be said to be arbitrary. *Hamilton* v. *Regents of University of California,* 293 U. S. 245 (1934). *Cf. In re Summers,* 325 U. S. 561 (1945). On the other hand, a state may not exercise its power to prescribe the curriculum in public schools so as to require children to salute and pledge allegiance to the flag because it has no interest sufficiently weighty to justify the action. *West Virginia State Board of Education* v. *Barnette, supra.*

The crux of the matter is that the Due Process Clause forbids arbitrary exercise of governmental power even in the performance of proprietary functions. It is true that where only economic interests are affected the Court will respect the judgment of the legislature except in extreme cases of patent irrationality. But, as we have indicated, where interests more precious than monetary ones are threatened, a more strict judicial scrutiny will be imposed. See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, fn. 4 (1937).

In *Meyer* v. *Nebraska, supra,* this Court passed on the constitutionality of a state statute which, like the present one, sought to regulate curriculum content through the criminal law. It provided that "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school teach any subject to any person in any language other than the English language." It also provided that "Languages, other than the English language, may be taught as languages only after a pupil has attained and successfully passed the eighth grade * * *" Violation of the law constituted a misdemeanor. It is important to note that this case was decided before the Court held the First Amendment applicable to the states, either in its free speech or freedom of religion aspects. *Gitlow* v. *New York,* 268 U. S. 652 (1925); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). Nevertheless, the Court held that statute unconstitutional, saying (236 U. S. at 390):

> The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State shall * * * deprive any person of life, liberty or property, without due process of law."
>
> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those

> privileges long recognized at common law as essential to the orderly pursuit of happiness by free men * * * *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.* Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts * * * (Emphasis added. Citations omitted.)

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), this Court reiterated this principle and again held that the Due Process Clause forbids state action which is arbitrary in that it "has no reasonable relation to some purpose within the competency of the state." Like *Meyer* v. *Nebraska, supra, Pierce* was not based on freedom of religion, as is evident from the fact that the same opinion encompassed the companion case of *Pierce* v. *Hill Military Academy*, which involved a purely secular school.

Measured by this test, we submit, the Arkansas statute cannot stand. It is arbitrary and therefore violative of the Fourteenth Amendment because it has no reasonable relation to any purpose within the competency of the state to effect. The sole purpose of a statute making it a penal offense to tell children that there is a theory (not necessarily an established doctrine—the Arkansas statute speaks in the alternative) that man ascended or descended from a lower order of animals is to protect a particular sectarian faith from the danger of secular, scientific inquisitiveness. As we suggest in our next point, such a statute

is a religious law forbidden by the Establishment Clause of the First Amendment. Here we suggest that, independent of that ground, the purpose is not within the competency of the state to effect, and that accordingly the law is arbitrary and wanting in due process.

POINT II

The Arkansas law is a religious law and hence violative of the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth.

Initially we point out that this case does not present a question of the freedom of religion of those children and their parents whose faith precludes learning about the theory of evolution, even as a theory. That question would be present if children were compelled to participate in or even be present during the teaching of evolution, as Jehovah's Witnesses children were compelled to participate in the flag salute ceremony in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940) and *West Virginia State Board of Education* v. *Barnette, supra.*

The doctrines of the Christian Science faith forbid children to learn the germ theory of disease and many states by statute or practice allow children of Christian Scientists to absent themselves while this part of the biology course is taught. See, e.g., N. Y. Educ. Law sec. 3204(5). Nothing prevents the State of Arkansas from exempting from attendance at sessions of the biology course dealing with evolution the children of parents whose religious conscience would be violated by such attendance. Were the State of

Arkansas unwilling to do so, a substantial free exercise question might well arise. *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *In re Jenison*, 375 U. S. 14 (1963). But *cf. Braunfeld* v. *Brown*, 366 U. S. 599 (1961); *Donner* v. *New York*, 342 U. S. 884 (1951); *Garber* v. *Kansas*, 88 S. Ct. 236 (1967). This is not at issue in the present case. Here the question is whether a law making it a criminal offense for a public school biology teacher to tell the children, or to use a textbook which tells the children, that there is such a thing as a theory of evolution is a forbidden law respecting an establishment of religion.

Nor do we have here any case of hostility to religion or even unneutrality. Concededly, the First Amendment forbids governmental hostility to religion and imposes a mandate of neutrality. *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Zorach* v. *Clauson*, 343 U. S. 306 (1952). We may concede the unconstitutionality of a state law or practice which requires or authorizes public school teachers to teach children that the Biblical account of the creation is false. *United States* v. *Ballard*, 322 U. S. 78 (1944). What we do contend is that a penal statute forbidding teachers of a secular subject from informing their students that a widely-held scientific theory exists, solely because some may consider the theory inconsistent with the Biblical account of the creation, is not an act of neutrality but a specific aid to a particular religion and therefore a violation of the Establishment Clause of the First Amendment. In Galileo's day, it was heresy to teach that the earth revolved around the sun. Yet it can hardly be contended that the inclusion of this teaching in the public school curriculum constitutes unneutrality or manifests a hostility

to religion, nor can it be doubted that a law which makes it a crime to include it would render aid to a specific religious dogma.

The critical point is that the teaching of the theory of evolution, earth's revolution around the sun, and the germ theory of disease are all secular matters. The state's manipulation of its curriculum to bar these secular teachings solely to protect particular religious doctrines represents a law respecting an establishment of religion, no less than would a law requiring history instructors to teach that Jesus was divinely conceived and was resurrected after death.

In *Burstyn* v. *Wilson*, 343 U. S. 495 (1952), this Court suggested (at p. 505) that a law protecting "any or all religions from views distasteful to them" might "raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all." The Court did not find it necessary to explore the question further since it invalidated New York's censorship law under the free speech and free press guarantees of the Amendment. In the present case, however, we submit that such a law does in fact constitute a law respecting an establishment of religion and is inconsistent with the principle of the separation of church and state.

The Court's capacity to take judicial notice of the events of history[1] enables it to recognize the religious origin of the Arkansas statute as it noted the similar origin of the Maryland and Pennsylvania Sunday laws in *Mc-*

1. *Underhill* v. *Hernandez*, 168 U. S. 250 (1897); *The Scotia*, 14 Wall. 170, 186 (1872); *Wright* v. *Hollingsworth*, 1 Pet. 165 (1828).

Gowan v. *Maryland*, 366 U. S. 420 (1961) and *Two Guys* v. *McGinley*, 366 U. S. 582 (1961), and as it noted the nationalist origin of the anti-foreign language statutes invalidated in *Meyer* v. *Nebraska*, *supra*; *Bartels* v. *Iowa*, 262 U. S. 404 (1923); *Farrington* v. *Tokushige*, *supra*.

In *McGowan* v. *Maryland*, *supra*, this Court judicially noted that Sunday laws originated as religious laws and that their historic purpose was to forbid desecration of the Christian Sabbath and to coerce compliance with Christian doctrine. The Court nevertheless upheld the constitutionality of the state law assailed in that case because it found as a historical fact that in the course of time the religiosity of the law had disappeared and that its present purpose and effect was the secular one of assuring to all a day of rest and relaxation. However, in the closing paragraph of the Chief Justice's opinion for the Court, he was careful to note (366 U. S. at 453):

> Finally, we should make it clear that this case deals only with the constitutionality of §521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" clause *if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.* (Emphasis added.)

We submit that the sole purpose of the Arkansas anti-evolution law is to use the State's coercive power to protect and aid those sects that adhere to a literal interpretation of Genesis and hold heretical any theory that man may have evolved from a lower order of animals.

The legislative history of the statute leads to no other conclusion. The decade following World War I was one in which there were widespread legislative intrusions on academic freedom. In the West and Midwest, there were numerous efforts to outlaw private schools entirely (see *Pierce* v. *Society of Sisters, supra*; *Farrington* v. *Tokushige, supra*), or to forbid the teaching of foreign languages in private or public schools. (See *Meyer* v. *Nebraska, supra*; *Bartels* v. *Iowa*, 262 U. S. 404 (1923); *Bohning* v. *Ohio*, 262 U. S. 404 (1923).) During the same period, the legislatures turned to religious orthodoxy, particularly in the South and Southwest. In the period between 1921 and 1929, anti-evolution bills were introduced in 20 state legislatures.[2] In three of these states, Tennessee, Mississippi and Arkansas, the bills were enacted.[3]

The early Sunday laws made no effort to disguise their religious purpose,[4] this because they saw no constitutional

2. American Civil Liberties Union, "The Gag on Teaching" (2nd ed., 1937), p. 8.

3. Tennessee: Public Acts of 1925, ch. 27, Michie's Code, §§2344-5; Mississippi: Code Ann. §§7315-16; Arkansas: Stats. Ann. §§80-1627-28. On the background of these statutes, see, Beale, *A History of Freedom of Teaching in American Schools*, 202-207 (1941); Blanshard, *The Right to Read*, 213-216 (1955); Hofstadter and Metzger, *The Development of Academic Freedom in the United States*, Chap. VII (1955). On the notorious *Scopes* case in Tennessee, see *Scopes* v. *State*, 154 Tenn. 105 (1927); Darrow, *The Story of My Life*, pp. 244-278 (1932).

4. Thus, for example, the predecessor of the present New York Sunday Law was an act, passed in 1695, "against profanation of the Lord's Day called Sunday," with a preamble declaring:

> Whereas the true and sincere worship of God according to His will and commandments, is often profaned and neglected by many of the inhabitants and sojourners * * * who do not keep holy the Lord's Day but in a disorderly manner accustom themselves to travel, labor, walking * * * and the using of many other

or other objection to the use of the state's compulsory legal machinery to support the doctrines and dogmas of established religion. So, too, the earliest of the anti-evolution statutes, the Tennessee law, was refreshingly ingenuous. Entitled, "An Act prohibiting the teaching of the Evolution Theory in all the Universities, Normals, and all other Public schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for the violations thereof," the statute read, in part:

> SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That it shall be unlawful for any teacher in any of the Universities, Normals, and all other Public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

The Arkansas statute here in issue, enacted two years later, does not refer to "the story of the Divine Creation of man as taught in the Bible" but is otherwise an almost exact

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unlawful exercises and pastimes to the great scandal of the Holy Christian Faith. * * * (Quoted in *People* v. *Hoym*, 20 How. Pr. (N. Y.) 76 (1860).

The Massachusetts law, whose ultimate successor was upheld in *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617 (1961), enacted in 1629, read:

> To the end the Sabbath may be celebrated in a religious manner, we appoint that all that inhabit the plantation, both the general and particular employment, may surcease their labor every Saturday throughout the year at 3 of the clock in the afternoon, and that they spend the rest of the day in catechising and preparation for the Sabbath, as the ministers shall direct. (American State Papers on Freedom of Religion, p. 30 (1949).)

replica of the Tennessee law. The purposes of the two statutes are identical and their constitutional validity under the Establishment Clause are likewise identical.

It can hardly be doubted that a law forbidding the teaching of a secular fact because it may be inconsistent with "the story of the Divine Creation of man as taught in the Bible" violates the Establishment Clause. As the Court said in *Watson* v. *Jones,* 13 Wall, 679, 728 (1872):

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate morality and property, and which does not infringe personal rights is conceded by all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

It is true that the right "to teach any religious doctrine" does not extend to the exercise of that right in the public schools under state auspices. But the statement that the law must be heresy-blind and may support no dogma certainly applies to the domain of public education, and we can think of no more effective way of supporting a dogma than forbidding the teaching of a nonreligious scientific theory which a jury might find to be contrary to something "taught in the Bible." Suppose the majority of a public school board in a particular community were members of the Christian Science Church and issued a directive forbidding the teaching in the biology course of the germ theory of disease or anything else inconsistent with the doctrines contained in *Science and Health with Key to the Scriptures.* Or suppose the legislature in a particular state or city enacted a statute making it a criminal offense for a

teacher in any public school, college or university to teach any secular subject in a way which may be construed to deny some doctrine contained in the Book of Mormon. It can hardly be doubted that in either case the coercive force of law and the machinery of the public educational system would have been used to support particular religious dogma.

It is, of course, constitutionally irrelevant that a comparatively small minority of Americans adhere to the doctrines and believe in the dogmas expressed in Mary Baker Eddy's book or in the Book of Mormon, while a large number of Americans, perhaps a majority, adhere to the doctrines and dogmas expressed in the Bible. See *United States* v. *Ballard,* 322 U.S. 78, 86-87 (1944). The constitutionality of a compulsory Sunday law was upheld in *McGowan* v. *Maryland, supra,* not because Sunday is the religious Sabbath of most Americans, but because the law supported no Sabbath, majority or minority.

The Arkansas statute does not make specific reference to "the story of the Divine Creation of man as taught in the Bible," but the identity of the statutes in origin and purpose is hardly open to question; after all, no legal principle requires that judges close their eyes to what everyone else sees, or their minds to what everyone else knows. This is not a case where the correctness of a historical statement is challenged. The trial court's citation of the *Scopes* decision clearly rests on the assumption that the Tennessee and Arkansas statutes are constitutionally indistinguishable; it refused to follow the *Scopes* decision only because it "has been modified and made obsolete to

such an extent that it * * * should not be followed." (Jurisdictional Statement, p. 33.) The Supreme Court of Arkansas reversed only because it deemed the state's power to control curriculum in its schools to be plenary and judicially unreviewable.

In *McGowan* v. *Maryland, supra,* this Court upheld and applied historical exploration as a means to determine whether a law is religious and therefore forbidden by the Establishment Clause. It found that the particular statute before it had in fact originated as a religious law (366 U.S. at 446) but concluded that it had been purged of its original religiosity and had become a secular law, citing in support of its conclusion the numerous secularizing changes that had been effected since the law was originally adopted, e.g., those permitting operation of bathing beaches and amusement parks, the sale of alcoholic beverages, etc. (*id.* at 448). It was for this reason alone that the Court sustained the constitutionality of the Maryland Sunday law.

No such metamorphosis protects the Arkansas statute. No legislative amendments or judicial interpretations have modified in the slightest the pristine purity and piety of the 1927 law. It was a religious law when enacted and remains a religious law today. As such it is just the type of law forbidden by the Establishment Clause of the First Amendment.

In *Abington School District* v. *Schempp, supra,* this Court suggested the following test of constitutionality under the Establishment Clause (374 U.S. at 222):

> * * * The test may be stated as follows: what are the purpose and the primary effect of the enactment? If

> *either* is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * * (Emphasis added.)

Since, as we have indicated, the purpose of the Arkansas law was the advancement of religion (by protecting it from secular knowledge which might subject its teachings to doubting scrutiny) and that purpose has not changed since its enactment, that alone requires invalidation under the *Schempp* test, which speaks in the alternative. We submit, in addition, that the law is equally unconstitutional under the "primary effect" alternative. Not merely the primary but the exclusive effect of the law is the advancement of religion; we cannot conceive any other effect it might have.

Besides the historical test applied in *McGowan* and the purpose-effect test used in *Schempp*, a third test of validity under the Establishment Clause has been suggested by this Court, the test of neutrality. The decisions of this Court are unanimous in holding that the First Amendment mandates governmental neutrality between religion and nonreligion, and certainly between religion and religion. *Everson* v. *Board of Education*, 330 U.S. 1, 18; *McCollum* v. *Board of Education*, 333 U.S. 203; *Zorach* v. *Clauson*, 343 U.S. 306, 313-314; *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961).

It is common knowledge that many religions are not based upon a literal interpretation of the *Book of Genesis*. Nontheistic religions, which this Court held in *Torcaso* are

constitutionally entitled to equal treatment with theistic ones, certainly do not. Among theistic religions, liberal sects interpret the Bible symbolically and metamorphically rather than literally. Even among the orthodox sects the theory of evolution is by no means universally deemed heretical. Thus, for example, the translation and commentary of the *Pentateuch* by the late Chief Rabbi of the British Empire, Dr. J. H. Hertz, used universally in Orthodox Jewish Synagogues, states (at p. 194):

> In the face of this great diversity of views as to the manner of creation, there is, therefore nothing inherently un-Jewish in the evolutionary conception of the origin and growth of forms of existence from the simple to the complex, and from the lowest to the highest. * * * Man, modern scientists declare, is cousin to the anthropid ape. But it is not so much the descent, as the ascent of man, which is decisive. * * *

The Arkansas statute penalizes teaching secular facts which may be inconsistent with a particular, sectarian interpretation of the Bible, but does not forbid teachings consistent with it. This can hardly be described as neutrality between religions, much less neutrality between religion and nonreligion.

"Few groups," Mr. Justice Douglas has said, "have hesitated to create the political pressures that translate into secular law their notions of morality." *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43, 80 (1961) (dissent). Whether these efforts if successful transgress the limits of the Establishment Clause may be disputable. What, we

5. The Arkansas statute, it should be noted, forbids equally teaching the theory that man either ascended or descended from a lower order of animals.

suggest, is not disputable is that an establishment of religion is effected when a sectarian group translates into secular law its particular dogmas of religion; establishment of religion could hardly mean more.

POINT III

The Arkansas statute unconstitutionally abridges freedom of speech since it restricts both freedom to teach and freedom to learn in the absence of any clear and imminent danger to some substantial state interest justifying the restriction.

It is now commonplace that the Constitution protects freedom to hear as well as freedom to speak, and freedom to learn as well as freedom to teach. Academic freedom, the combination of freedom to teach and to learn, is protected by the First Amendment. This protection and the policy underlying it were most recently expressed by this Court in *Keyishian* v. *Board of Regents* (385 U. S. 589, 603 (1967)) in the following language:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, *which does not tolerate laws that cast a pall of orthodoxy over the classroom.* "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker,* 364 U. S. at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than

through any kind of authoritative selection." United States v. Associated Press, D.C., 52 F. Supp. 362, 372. In Sweezy v. State of New Hampshire, 354 U. S. 234, 250, we said:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. *To impose any strait jacket upon the intellectual leaders in our colleges and universities* would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. *Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.*" (Emphasis added.)

The Court in *Keyishian* held unconstitutional a statute which disqualified from academic employment in the state's public school system any teacher who advocated or was a member of an organization which advocated subversive doctrines because the statute had a "chilling effect" on the teacher's freedom to teach and the student's freedom to learn. This resulted from the fact that persons "trained through wide exposure to * * * robust exchange of ideas" would be barred from teaching in public educational institutions. This, however, is only an indirect restraint upon the freedom of the classroom; the Arkansas statute which forbids with penal sanctions the teaching of the theory of evolution or use of textbooks which teach it constitutes a

direct restraint upon the exercise of this First Amendment right.

It is no answer to say that if a teacher does not wish to accept the conditions of his employment he is free to refuse the employment. As the Court said in *Keyishian, supra* (385 U.S. at 605-606), "* * * the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." This is particularly true in a First Amendment case, for the restraint on the teacher's freedom to teach is simultaneously one upon the student's freedom to learn. The student has a personal stake in the teacher's freedom, a stake that cannot be bargained away in a private agreement between state and teacher.

We do not, of course, intimate that the state has no right of control over what the teacher may say in class. Obviously, school authorities can demand that mathematics teachers teach mathematics and biology teachers teach biology. There are, in addition, specific constitutional limitations on what public school teachers may teach. They may not, for example, indoctrinate their students in matters of religious belief or disbelief. *McCollum* v. *Board of Education, supra; Abington School District* v. *Schempp, supra.*

We may even go further. A school teacher does not enjoy in his classroom the absolute immunity accorded by the Constitution to members of the national legislature speaking on the floor of Congress (Article I, Section 6). Under the decisions of the majority of this Court, freedom of speech for non-Congressmen is not absolute. Nevertheless, freedom of speech does occupy a high estate in our hierarchy of constitutional values. Restraints upon that

freedom must be justified only by clear proof of an imminent danger to a substantial state interest. As Mr. Justice Brandeis said in his classic concurring opinion in *Whitney* v. *California*, 274 U.S. 357, 376 (1927):

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. * * *

What "serious evil will result" if public school and college teachers are permitted to teach that there is a theory that man ascended or descended from a lower order of animals? Quite possibly, a consequence of such teaching may be that some students will explore the subject further and arrive at an independent judgment as to its validity or invalidity. But this is exactly the consequence that the free-marketplace-of-ideas concept of the First Amendment seeks to achieve, and therefore certainly is not an evil, serious or otherwise. Possibly, too, some students might subject to a more exacting scrutiny the teachings they receive in Sunday schools regarding the *Book of Genesis*. Such scrutiny might weaken the religious faith of some, but it might also strengthen the faith of others who might be led to exclaim with the Psalmist: "O Lord, how manifold are thy works! in wisdom hast thou made them all * * *" (104:24). In either case, as we have indicated in Point II, the Constitution forbids the state from judging the consequence to be an evil.

It follows that the absence of any constitutionally cognizable substantive evil precludes state restraint on teachers' freedom to teach and students' freedom to learn. The Arkansas statute therefore cannot stand under the free speech guaranty of the First Amendment.

Conclusion

The Arkansas statute is vulnerable on several grounds other than those suggested in this brief. Its language is constitutionally vague, particularly for a penal statute. It is overbroad in its coverage, encompassing as it does educational institutions from kindergarten through university. We have preferred, however, to point our brief to more substantial issues. This is not a little case about an archaic and perhaps in large measure dead-letter law. It is a case raising serious questions of arbitrary governmental action, church-state separation and academic freedom. These questions call for resolution by this Court. They call also for a determination that the statute is unconstitutional.

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